INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Cases believed to sustain the jurisdiction	2
Nature of the case	3
Exhibit "A"—Opinion of the Supreme Court of the State of Georgia	6

Table of Cases Cited.

Bornee, Ex parte, 1915 F. L. R. A., N. S. 1093	3
Bowen v. *Johnson,* 306 U. S. 19, 83 L. Ed. 455	2
Chambers v. *State of Florida,* 309 U. S. 227	2
Day v. *Smith,* 172 Ga. 470	3
Griffin v. *State,* 28 Ga. App. 767	3
Hopkins v. *State,* 6 Ga. App. 404	3
Holt v. *State,* 38 Ga. 187	2
Ingraham v. *State,* 124 Ga. 448	3
Noland v. *State,* 55 Ga. 526	3
Piggly-Wiggly v. *May Investment Co.,* 189 Ga. 477	3
Pierre v. *Louisiana,* 306 U. S. 354, 83 L. Ed. 957	2
Richards v. *McMahan,* 139 Ga. 39	3
State v. *Cooper,* 13 N. J. Law 361	3
State v. *Mowser,* 106 Atl. 416	3
Wills v. *Prigden,* 151 Ga. 400	3

Statutes Cited.

Constitution of Georgia, Article I, Section 1, paragraph 8	4
Constitution of the United States, Article V	4
Constitution of the United States, 14th Amendment	4
Whorton's Pleading and Practice, 9th Ed., Section 467	3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 617

Appeal from the Supreme Court of Georgia. Case No. 13435.

JOHN SHERMAN HARRIS,

Appellant,

vs.

M. GARY WHITTLE, SHERIFF,

Appellee.

BRIEF FOR APPELLANT ON JURISDICTIONAL POINTS.

This is an appeal from a judgment refusing to discharge appellant from custody on a writ of *habeas corpus.* In the beginning we would state, that it is not an effort to substitute such writ for a writ of error, or any other remedial remedy. Under the peculiar facts in the record, we insist that if the judgment of the Supreme Court of Georgia stands, it would be tantamount to the suspension of the writ of *habeas corpus.*

The judgment of this Court is invoked upon an asserted claim that the life and liberty of appellant is at stake, and that he has been denied rights guaranteed to him under the

Constitution of the United States as set forth in the assignment of errors.

We believe that the following decisions, and the citations therein, sustain the jurisdiction of this Court; so much so that we rest our case thereon. We are frank to concede that if they do not sustain the jurisdiction of this Court, our effort is in vain. These decisions are as follows:

Bowen v. *Johnson,* 306 U. S. 19, 83 L. Ed. 455.

Pierre v. *Louisiana,* 306 U. S. 354, 83 L. Ed. 957.

Chambers v. *State of Florida,* 309 U. S. 227, decided February 12, 1940.

If the asserted Federal question is substantial, then as we understand the law, this Court will pass upon all questions, both State and Federal. If we are wrong, the authorities we now cite will be disregarded.

In the interest of brevity, we shall quote only from one. In *Holt* v. *State,* 38 Ga. 187, it was said:

> "If the State thinks proper, by its prosecuting officer, to indict a party for * * * murder, upon a given state of facts, and upon the trial thereof the defendant is acquitted, can the State then prefer another indictment, alleging precisely the same state of fact * * * and put the party again upon his trial for the same criminal acts, by altering the name of the offense? The State having made its election as to the nature and character of the offense for which it will prosecute the party upon a given state of facts, if, upon the trial, the defendant is acquitted, ought not the State to be bound by its election, and not be permitted again to indict and prosecute the defendant for the *same criminal acts,* under the *name of another offense*? The question to be answered is, has the defendant been arraigned and put upon his trial upon a sufficient legal accusation, for the *same criminal acts* with which he is charged the *second time*? If he has, then he has been put in jeopardy, within the true intent and meaning of the con-

stitution, and can not be tried the second time for the same criminal acts, under the same, or a different named offense. To hold otherwise would be to hold that the *provision of the constitution* which declares, 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb,' for all practical purposes, to be a mere *shadow*, and *delusion*. These views are in accordance with the ruling of this court in Roberts and Copenhagen *v.* State, 14th Ga. Rep., 8."

Ingraham v. *State*, 124 Ga. 448.
Griffin v. *State*, 28 Ga. App. 767.
Hopkins v. *State*, 6 Ga. App. 404.
Day v. *Smith*, 172 Ga. 470.
Richards v. *McMahan*, 139 Ga. 39.
Noland v. *State*, 55 Ga., 526.
Ex Parte Bornee, 1915 F. L. R. A. (N. S.) 1093.
State v. *Cooper*, 13 N. J. Law 361.
Wills v. *Pridgen*, 151 Ga. 400.
Whorton's Pleading and Practice, 9th Ed., Section 467.
State v. *Mowser*, 106 Atl. 416.
Piggly-Wiggly v. *May Investment Co.*, 189 Ga. 477.

The decision of the Supreme Court of Georgia, from which the appeal is taken, is as follows:

"The writ of *habeas corpus* is an available remedy for release of one illegally restrained of his liberty. Code 50-106. Detention by arrest under a bench warrant based on an indictment regular upon its face (27-801) is not illegal; and consequently the writ of *habeas corpus* is not available for discharge of one so arrested. Code 50-116 (3). See 29 *C. J.*, 45 Sec. 37; Holder *v.* Beavers, 141 Ga. 217 (2); Jackson *v.* Lowery, 170 Ga. 755.

(1) The Judge did not err in refusing to discharge the accused on writ of *habeas corpus*.

(2) It is unnecessary to pass on other assignments of error in reference to the right of the State to place

a person on trial under an indictment for robbery by force, when such person had been previously acquitted under an indictment for murder committed during an attempted robbery, based on the same facts, and dependent for conviction upon the same evidence as was depended upon in the trial for murder.

Judgement affirmed. All the Justices concur.

On December 17, 1938, Clelian Chalker was killed during an attempt to rob him. John Sherman Harris was indicted for murder by shooting Chalker with a pistol. The jury returned a verdict of guilty, without a recommendation. On writ of error the judgment refusing a new trial was reversed. Harris *v.* State, 188 Ga. 745. On another trial (a change of venue having been allowed) the jury returned a verdict of not guilty, and the defendant was released from custody. Subsequently he was indicted for robbery by force, alleged to have been committed against Chalker on the day he was killed. When again taken into custody under a bench warrant based on the last indictment, he instituted *habeas corpus* proceedings, alleging that to again place him on trial would deny the rights guaranteed under Article 1, Section 1 of paragraph 8, of the Constitution of Georgia (2-108), which provides "No person shall be put in jeopardy of life, or liberty, more than once for the same offense, save on his own motion for a new trial after conviction, or in case of a mistrial; and under Article 5 of the Constitution of the United States (1-805), which provides, in part: No person shall be held * * * for the same offense to be twice put in jeopardy of life or limb," and would be violative of the 14th Amendment of the Constitution of the United States (1-815) which provides in part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law," because to now place your petitioner on trial the second time, ostensibly for a different offense, but actually for the same offense, covered by the same facts, and dependent upon the same evidence, for con-

viction, as was depended upon in his former trial for murder * * * and upon which he was acquitted would be to deprive him illegally of his constitutional guarantees. The evidence on the murder trial showed that Chalker was killed during an attempted robbery. The exception is to a judgment denying the application for *habeas corpus,* and remanding the defendant to the custody of the officer."

Respectfully submitted,

BENJ. E. PIERCE,
Attorney for Appellant.

Post Office Address: Augusta, Georgia.

EXHIBIT "A".

SUPREME COURT OF GEORGIA.

Decided September 24, 1940.

No. 13435.

HARRIS *v.* WHITTLE, Sheriff.

By the COURT:

ATKINSON, *Presiding Justice:*

1. The writ of *habeas corpus* is an available remedy for release of one illegally restrained of his liberty. Code, § 50-101. Detention by arrest under a bench warrant based on an indictment regular upon its face (§ 27-801) is not illegal; and consequently the writ of *habeas corpus* is not available for discharge of one so arrested. § 50-116 (3). See 29 *C. J.* 45, § 37; Holder *v.* Beavers, 141 Ga. 217 (2) (80 S. E. 715); Jackson *v.* Lowry, 170 Ga. 755 (154 S. E. 228). The judge did not err in refusing to discharge the accused on writ of *habeas corpus.*

2. It is unnecessary to pass on other assignments of error in reference to the right of the State to place a person on trial under an indictment for robbery by force, where such person had been previously acquitted under an indictment for murder committed during an attempted robbery, based on the same facts, and dependent for conviction upon the same evidence as was depended upon in the trial for murder.

Judgment affirmed. All the Justices concur.

On December 17, 1938, Clelian Chalker was killed during an attempt to rob him. John Sherman Harris was indicted for murder by shooting Chalker with a pistol. The jury returned a verdict of guilty, without a recommendation. On writ of error the judgment refusing a new trial was reversed. Harris *v.* State, 188 Ga. 745 (4 S. E. 2d, 651). On another trial (a change of venue having been allowed) the jury returned a verdict of not guilty, and the defendant was released from custody. Subsequently he was indicted

for robbery by force, alleged to have been committed against Chalker on the day he was killed. When again taken into custody under a bench warrant based on the last indictment, he instituted *habeas corpus* proceedings, alleging that to again place him on trial would deny the rights guaranteed under Article 1, Section 1, paragraph 8, of the Constitution of Georgia (Code, § 2-108), which provides "No person shall be put in jeopardy of life, or liberty, more than once for the same offense, save on his or her own motion for a new trial after conviction, or in case of mistrial," and under article 5 of the Constitution of the United States (§ 1-805), which provides, in part: "No person shall be held • • • for the same offense to be twice put in jeopardy of life or limb," and would be violative of the 14th amendment to the Constitution of the United Sates (§ 1-815) which provides, in part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law," because "to now place your petitioner on trial the second time, ostensibly for a different offense, but actually for the same offense, covered by the same facts, and dependent upon the same evidence, for conviction, as was depended upon in his said former trial for murder • • • and upon which he was acquitted, would be to deprive him illegally of his constitutional guaranties." The evidence on the murder trials showed that Chalker was killed during an attempted robbery. The exception is to a judgment denying the application for *habeas corpus,* and remanding defendant to the custody of the officer.